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No. 88-464

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Petitioners,

v.

CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE NATIONAL RAILWAY LABOR CONFERENCE AS AMICUS CURIAE IN OPPOSITION TO THE PETITION

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BRIEF FOR THE NATIONAL RAILWAY LABOR CONFERENCE AS AMICUS CURIAE IN OPPOSITION TO THE PETITION

This *amicus* brief is being filed with the written consent of the parties pursuant to Supreme Court Rule 36.1.

STATEMENT OF THE CASE

Respondent Chicago & North Western Transportation Company ("C&NW") has agreed, with the approval of the Interstate Commerce Commission under § 10901 of the Interstate Commerce Act,[1] to sell approximately 208

[1] 49 U.S.C. § 10901.

miles of railroad line in Wisconsin, known as the "Duck Creek South" lines, to respondent FRVR Corporation. C&NW proposes to abolish the jobs it now maintains along the lines upon consummation of the sale, acting under what it believes is express authority granted to it in "force-reduction" provisions in its collective bargaining agreements with the unions that represent affected employees. Petitioner Railway Labor Executives' Association ("RLEA"), on behalf of its member unions, contends to the contrary that the abolishments will change the status quo with respect to "rates of pay, rules, and working conditions" on the C&NW and would therefore give rise to a so-called "major dispute" and violate §§ 2 Seventh and 6 of the Railway Labor Act.[2]

RLEA threatened to strike C&NW over its alleged departure from the status quo. In January, 1988, C&NW filed suit in the district court for the Northern District of Illinois for a declaratory judgment that such a strike would be unlawful under both the Railway Labor Act and the Interstate Commerce Act. RLEA counterclaimed for a Railway Labor Act status quo injunction against the proposed job abolishments. On March 16, 1988, the district court, on cross-motions by the parties for preliminary injunctive relief, preliminarily enjoined the strike and refused to enjoin the job abolishments. The court found that C&NW's claimed justification for the

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[2] Section 2 Seventh provides that a carrier may not "change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements, except in the manner prescribed in such agreements or in [section 6] of this [Act]." 45 U.S.C. § 152 Seventh. Section 6 provides that either party may propose a "change in agreements" by written notice, and that while such notice is pending "rates of pay, rules, and working conditions shall not be altered by the carrier * * *." 45 U.S.C. § 156. RLEA claimed § 6 was applicable in this case because certain of its member unions had served notices proposing that C&NW agree to provide labor protection for employees affected by the job abolishments on the Duck Creek South lines.

job abolishments under the collective bargaining agreements could not be dismissed as frivolous, and thus held that RLEA's challenge to the abolishments presented an arbitrable "minor dispute" over the correct interpretation of the agreements under § 3 of the Railway Labor Act, 45 U.S.C. § 153. (Petition for Certiorari ["Pet."] at 30a). As the court noted, strikes over minor disputes are unlawful and enjoinable,[3] and courts lack jurisdiction to enjoin carriers from implementing their interpretations of labor agreements pending arbitration of minor disputes by adjustment boards under § 3 of the Railway Labor Act unless employees will suffer harm in the interim that cannot be remedied by an arbitrator.[4] (Pet. at 31a).

The United States Court of Appeals for the Seventh Circuit affirmed the district court's judgment on August 23, 1988. Setting forth the applicable Railway Labor Act law, the court of appeals explained that if a "dispute can be resolved by reference to the parties' collective bargaining agreement, *i.e.*, if it is 'arguably comprehended within an already existing collective bargaining agreement,' it is a minor dispute." (Pet. at 9a) (citations omitted). If, the court continued, " 'the parties disagree over whether the dispute can be resolved by reference to an agreement the dispute is minor unless the claims of contractual justification are 'frivolous' or 'obviously insubstantial.' " (*Id.* at 11a) (citations omitted). The court "carefully evaluated the claims of the parties and examined the evidence in the record as to the terms of their collective bargaining agreements and the rele-

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[3] The general ban on strike injunctions under the Norris-LaGuardia Act is accommodated to § 3 of the Railway Labor Act, which prescribes peaceful resolution of minor disputes through the arbitration process, as part of the "pattern of labor legislation." *Trainmen* v. *Chicago R. & I. R. Co.*, 353 U.S. 30, 42 (1957).

[4] See *Locomotive Engineers* v. *M.-K.-T. R. Co.*, 363 U.S. 528 (1960).

vant past practices attendant to those agreements," and concluded that C&NW's position that the Duck Creek South job abolishments are authorized by its collective bargaining agreements "has at least an arguable basis in the * * * agreements and relevant past practice [and] cannot be said to constitute the type of clear departure from those agreements necessary to trigger a finding of a § 6 major dispute * * *." (*Id.* at 14a-15a). The court thus held that the dispute between the parties is minor, that any strike over it would be unlawful, and that the district court was "without jurisdiction to issue a broad status quo injunction." (*Id.* at 19a-20a). Finally, the court held that there was no occasion for the district court to exercise its extraordinary equitable powers to protect employees from irreparable harm pending arbitration of the dispute, because if the adjustment board "rejects C&NW's interpretation of the collective bargaining agreements and determines that the employees who are displaced by the challenged rail line sale are entitled to relief, it will be able to order the necessary payment of monies and adjustments in seniority levels it deems necessary to make those employees whole." (*Id.* at 21a).

INTEREST OF AMICUS CURIAE

The National Railway Labor Conference ("NRLC") is an unincorporated association which includes almost all of the nation's class I railroads among its members. NRLC represents member railroads in multi-employer collective bargaining under the Railway Labor Act, as well as in regard to other labor relations matters of concern to the railroad industry generally. In addition, the NRLC advises and assists its member railroads in connection with Railway Labor Act arbitration of minor disputes arising out of workplace grievances or the interpretation or application of collective bargaining agreements.

The NRLC has recently urged the Court to grant certiorari in other pending cases that raise questions as to the lawfulness of strikes and the validity of union demands for bargaining over labor protection in connection with ICC-approved line sales subject to imposition of labor protection under § 10901 of the Interstate Commerce Act.[5] Those cases present questions as to the proper accommodation between the contrary mandates of the Interstate Commerce Act on the one hand and the Railway Labor Act and the Norris-LaGuardia Act on the other, over which the lower courts are in conflict and which this Court has not addressed.

This case, as RLEA points out, "differs" from other pending line sale cases because the court of appeals did not address any question under the Interstate Commerce Act or as to the relation of that Act's labor protection provisions to the other labor statutes that apply to the railroad industry. (Pet. at 14). Indeed, the court of appeals explicitly declined to reach such questions because it found "a full and proper basis for affirming the district court" in well-settled Railway Labor Act law as to the arbitrability of minor disputes over the interpretation or application of labor agreements. (*Id.* at 21a & n.6, 20a n.4). RLEA's petition in this case raises only a Railway Labor Act question, challenging the established rule that whether such an arbitrable dispute is presented in a strike or status quo case depends on whether a carrier's contractual justification for its challenged actions is at least arguably correct. (Pet. at i).

The disposition of the question presented here under the Railway Labor Act can have no bearing on the merits of the Interstate Commerce Act questions before the

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[5] Brief for the National Railway Labor Conference as *Amicus Curiae* in Support of the Petition in *Pittsburgh & Lake Erie R.R.* v. *RLEA*, No. 87-1888; Brief for the National Railway Labor Conference as *Amicus Curiae* in Support of the Petition in *Pittsburgh & Lake Erie R.R.* v. *RLEA*, No. 87-1589.

Court in the other pending line sale cases. Nor will the ultimate result in this case obviate, as a practical matter, the necessity for this Court to resolve the conflict among the circuit courts of appeals as to the Interstate Commerce Act questions which, as we have explained in our briefs in support of certiorari in the two *Pittsburgh & Lake Erie* cases, threatens to halt the revitalization of the industry through sales of marginal or otherwise abandonable lines to new operators. Not all selling carriers will be in a position to rely on their collective bargaining agreements in implementing the effects of these sales on employees—indeed, the Pittsburgh & Lake Erie Railroad made no minor dispute argument in the cases now pending before the Court. Regardless of the result in this case, the controversy over the effect of the Interstate Commerce Act on other labor laws will remain live and divisive, and will require resolution by this Court. Thus, we submit, granting the petition in this case will not aid the Court in disposing of the *Pittsburgh & Lake Erie* cases and other pending cases that present Interstate Commerce Act accommodation questions.

NRLC opposes the petition for certiorari in this case. RLEA's petition concededly seeks a radical departure from the now well-settled law governing the arbitrability of minor disputes over the interpretation and application of labor agreements (Pet. at 19), which the courts of appeals have unanimously applied, and which this Court has often addressed. RLEA contends that the courts have jurisdiction to "examine the merits of a rail carrier's reliance on collective bargaining agreements" in cases where unions opt to challenge alleged departures from such agreements as status quo violations, either by striking or by suing for injunctive relief. (Pet. at i). RLEA is not likely to prevail on that contention. It is contrary to the Railway Labor Act's express provision for arbitration of minor disputes by the adjustment boards, to this Court's frequent admonitions that the boards' jurisdic-

tion is "exclusive," [6] and to the strong "federal policy favoring arbitration of labor disputes" generally,[7] and RLEA's proffered new rule would destabilize labor relations in this vital national industry by encouraging litigation and strikes over workplace grievances which arise daily and now are committed to arbitration. The only effect that would ensue if the petition were granted would be to create uncertainty in what has heretofore been settled law while this Court reconsiders the question whether the jurisdiction of adjustment boards over minor disputes is exclusive—a question it has repeatedly answered affirmatively—thus undercutting in the interim the ability of railroads to rely on bargained-for rights and benefits under their collective bargaining agreements when making changes that are essential to their operations. Preventing such injurious uncertainty is of paramount interest to the NRLC and its member railroads.

ARGUMENT

The Decision Below Rests on the Incontrovertible and Well-Settled Rule That Disputes over the Interpretation of Labor Agreements Are for Arbitrators, Not the Courts, Which Is Essential to Stable Labor Relations in the Railroad Industry

Under the Railway Labor Act, major disputes under §§ 2 Seventh and 6 of the Act and minor disputes under § 3 of the Act "are sharply distinguished," both "substantively and procedurally," as this Court first recognized in *Elgin, J. & E. R. Co.* v. *Burley*, 325 U.S. 711, 722 (1945). Major disputes arise from efforts to "secure" or "change the terms of" collective bargaining agree-

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[6] *E.g., Andrews* v. *Louisville & N. R. Co.*, 406 U.S. 320, 325 (1972); *Locomotive Engineers* v. *Louisville & N. R. Co.*, 373 U.S. 33, 38 (1963); *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U.S. 239, 244 (1950).

[7] *Gateway Coal Co.* v. *United Mine Workers*, 414 U.S. 368, 377 (1974).

ments, where "therefore the issue is not whether an existing agreement controls the controversy." They "look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past." *Id.* at 723. If the parties cannot reach agreement in a major dispute, the union may strike. *Id.* at 725. Minor disputes, by contrast, relate "either to the meaning or proper application of a particular provision" of an existing agreement "with reference to a specific situation or to an omitted case." That is, they involve claims "to rights accrued, not merely to have new ones created for the future." *Id.* at 723. Minor disputes are committed to compulsory arbitration by adjustment boards under § 3 of the Act. *Id.* at 727-28. Strikes over minor disputes are unlawful and may be enjoined. *Trainmen* v. *Chicago R. & I. R. Co.*, 353 U.S. 30 (1957).

This Court has held time and again that the adjustment boards' jurisdiction over minor disputes is "exclusive,"[8] and has specifically held that "Congress considered it essential to keep * * * 'minor' disputes within the Adjustment Board and out of the courts." *Union Pacific R. Co.* v. *Sheehan*, 439 U.S. 89, 94 (1978).[9] That conclusion follows directly from the Act's fundamental purpose of promoting "stability in labor-management relations in this important national industry." *Id.*; see 45 U.S.C. § 151a. The system of "internal government" under

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[8] *E.g.*, *Andrews* v. *Louisville & N. R. Co.*, 406 U.S. 320, 325 (1972); *Locomotive Engineers* v. *Louisville & N. R. Co.*, 373 U.S. 33, 38 (1963); *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U.S. 239, 244 (1950).

[9] See also, *e.g.*, *Order of Conductors* v. *Pitney*, 326 U.S. 561, 566 (1946) (Congress "intended to leave minimum responsibility to the courts" under the Railway Labor Act); *General Committee* v. *M.-K.-T. R. Co.*, 320 U.S. 323, 333 (1943) ("The inference is strong that [in the Railway Labor Act] Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate.").

§ 3 of the Act[10] was designed "to secure the prompt, orderly and final settlement of grievances that arise daily between employees and carriers" as to the proper interpretation and application of collective bargaining agreements, express and implied,[11] to place such grievances in the hands of expert arbitrators versed in the railroad industry's customs and practices,[12] and ultimately to minimize conflicts between labor and management leading to interruptions of transportation services.[13] The Railway Labor Act thus expresses by statutory mandate the strong "federal policy favoring arbitration of labor disputes" that this Court has held applies even where, as under the National Labor Relations Act, arbitration is mandatory only if the parties agree to it. *Gateway Coal Co.* v. *United Mine Workers*, 414 U.S. 368, 377 (1974).

Under the Railway Labor Act, it frequently happens, as it did in this case, that labor will challenge action by a carrier that the carrier believes is authorized under existing agreements, and the parties will disagree as to whether the resulting dispute is major or minor. In such cases, the carrier will contend that the change it has made or proposes making is authorized under its existing agreements and thus that any union challenge can present only a minor dispute. The union will contend that the carrier's action is an unauthorized departure from the status quo that gives rise to a major dispute. Every court of appeals that has been presented with such a case has recognized, as the court of appeals did in this case, that the "status quo" includes the carrier's rights

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[10] *Pennsylvania R. Co.* v. *Day*, 360 U.S. 548, 552 (1959).

[11] *Union Pacific R. Co.* v. *Sheehan*, *supra*, 439 U.S. at 94; see 45 U.S.C. § 151a(5).

[12] *Gunther* v. *San Diego & A.E. R. Co.*, 382 U.S. 257, 261 (1965); *Order of Conductors* v. *Pitney*, *supra*, 326 U.S. at 566-67.

[13] *Slocum*, *supra*, 339 U.S. at 242; *Union Pacific R. Co.* v. *Price*, 360 U.S. 601, 609 (1959).

under existing agreements,[14] and has held that the dispute is minor if the carrier's position under its agreements is at least "arguable," or is not "frivolous" or "obviously insubstantial." [15]

RLEA attacks this uniform approach on two bases, both of which are irreconcilable with the Act's provisions and with applicable decisions of this Court:

1. First, RLEA contends that, at least in cases where unions have served § 6 notices seeking to change the existing agreements, the courts' power to enforce the status quo under § 6 gives them jurisdiction to determine "what working conditions constitute the status quo," and to disregard the carriers' rights under existing agreements in making that determination. (Pet. at 26). According to RLEA, that follows from this Court's decision in *Shore Line* v. *Transportation Union*, 396 U.S. 142 (1969). In *Shore Line*, the Court rejected a carrier's contention that its obligation under § 6 to maintain unchanged the "working conditions" in effect when a § 6 service was served until major dispute procedures are

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[14] See, *e.g.*, *RLEA* v. *Boston & Maine Corp.*, 808 F.2d 150, 156 (1st Cir. 1986); *Baker* v. *United Transp. Union*, 455 F.2d 149, 157 (3d Cir. 1971); *United Transp. Union* v. *St. Paul Union Depot Co.*, 434 F.2d 220, 223 (8th Cir. 1970).

[15] In addition to the decision below, see, *e.g.*, *Air Line Pilots Ass'n* v. *Eastern Air Lines*, Nos. 88-7201 - 88-2074 (D.C. Cir. Sept. 30, 1988); *Maine Central R.R.* v. *United Transp. Union*, 787 F.2d 780 (1st Cir. 1986); *Baylis* v. *Marriott Corp.*, 843 F.2d 658, 663 (2d Cir. 1988); *Goclowski* v. *Penn Central Transp. Co.*, 571 F.2d 747, 755 n.11 (3d Cir. 1977); *Dement* v. *Richmond, F. & P. R.R.*, 845 F.2d 451, 463 (4th Cir. 1988); *Railway Exp. Agency, Inc.* v. *Brotherhood of Ry., Airline & S.S. Clerks*, 437 F.2d 388, 392 (5th Cir. 1972); *Brotherhood of Loc. Engineers* v. *Consolidated Rail Corp.*, 844 F.2d 1218, 1221 (6th Cir. 1988); *International Ass'n of Machinists* v. *Soo Line R.R.*, 850 F.2d 368, 376-77 (8th Cir. 1988) (*en banc*); *Brotherhood of Loc. Engineers* v. *Burlington N. R.R.*, 838 F.2d 1102, 1105 (9th Cir. 1988). *Cf. Paperworkers* v. *Misco*, 108 S.Ct. 364, 371 (1987).

exhausted extended only to those working conditions expressly provided for in written agreements, and held that the status quo includes all "actual, objective working conditions and practices broadly conceived." 396 U.S. at 143, 153.

But *Shore Line* did not hold that the carrier's rights under existing agreements are nullified by the status quo obligation triggered by a union's § 6 notice, as RLEA contends. On the contrary, the Court was at pains to note that, even though the written agreements did not address the carrier's right to make the changes in work assignments that the union challenged, the fact that a § 6 notice was pending "would not have barred the railroad from ordering the assignments * * * if, apart from the [written] agreement, such assignments had occurred for a sufficient period of time with the knowledge and acquiescence of the employees to become in reality a part of the actual working conditions." 396 U.S. at 153-54.[16] RLEA's view of the Act's status quo provisions as instruments of destruction of established contractual rights, rather than their preservation, far from being supported by *Shore Line*, is directly contrary to that decision, and to the Act itself, which seeks to "maintain agreements," not to nullify them. See 45 U.S.C. § 152 First.

2. Second, RLEA contends that, even if a carrier's agreements are relevant in a status quo case, the uniform standard being applied by the courts of appeals, which looks only to whether the carrier's justification for its

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[16] "[T]he practices of the industry and the shop [are] equally a part of the collective bargaining agreement although not expressed in it," as this Court noted in a case arising under the National Labor Relations Act. *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960). The axiomatic rule that such established past practices are part of the implied agreement of the parties (see Restatement (Second) of Contracts § 223 (1981)) is equally applicable under the Railway Labor Act. See, *e.g.*, *Transportation Union* v. *U.P.R. Co.*, 385 U.S. 157, 161 (1966); *Brotherhood of Maintenance of Way Employees* v. *Chicago & N.W. Transp. Co.*, 827 F.2d 330, 334 (8th Cir. 1987).

actions under its agreements is at least "arguable," is unduly "myopic." (Pet. at 19). According to RLEA, the courts should have the power to "examine the merits of a rail carrier's reliance on collective bargaining agreements and past practice" in status quo cases, since it is up to the courts to enforce the status quo. (Pet. at i, 22). That contention is untenable, because the uniform standard is the only permissible one under the Act. If a carrier's claim of contractual justification for a challenged action is arguably correct and cannot be dismissed as "frivolous" or "obviously insubstantial," then a question as to the proper interpretation of the agreements is presented. That is precisely the type of question that the adjustment boards were created to resolve—the "interpretation or application" of labor agreements, 45 U.S.C. § 153 First (i)—and that Congress intended to keep "out of the courts." *Union Pacific* v. *Sheehan*, *supra*, 439 U.S. at 94. This Court recognized that in *Pitney*, *supra*, holding that where a carrier's defense to a § 6 or § 2 Seventh claim puts the meaning of its labor agreements into issue, the court must stay its hand until "after the Adjustment Board acts * * *." 326 U.S. at 565-67.[17] If courts in status quo cases took any harder look after determining that a question of contract interpretation is presented, they would unquestionably be poaching on the statutory preserve of the adjustment boards.

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[17] In the later *Shore Line* case, the carrier did not contend that its existing agreements authorized it to make the challenged changes, and so there was no occasion for this Court to address the question presented in this case, and in *Pitney*, *i.e.*, whether, if such a contention had been made and contested by the union, the court could have proceeded to decide it. *Shore Line* did not, thus, overrule *Pitney*, and indeed *Shore Line* reaffirmed the holding in *Pitney* that where the question whether a carrier's unilateral action violates the status quo depends on the parties' rights under existing agreements, "the proper forum for interpreting the agreements [is] the Adjustment Board provided by Congress in the Railway Labor Act, § 3 First (i), for that purpose * * *." 396 U.S. at 156-57.

A rule that would classify disputes as minor or major not according to whether they are, in fact, disputes over the interpretation of agreements, but according to the means by which rail labor chooses to challenge carrier actions, would thus obliterate the distinction between major and minor disputes for all practical purposes. Rail labor, at its option, could bring any minor dispute to court, simply by claiming that what it perceives as a carrier's departure from existing agreements violates the status quo under §§ 2 Seventh or 6, and either suing for a status quo injunction or striking and compelling the carrier to come to court for relief. In either case, the court would be free to decide the merits of the parties' respective positions on the agreements, thus eliminating any role for the adjustment board in the dispute.

If that were the rule, Congress' purpose in creating the adjustment boards in the first instance—to promote stable labor relations in the railroad industry and avoid interruptions to commerce—would be nullified. Unions would have every incentive to strike or sue in opposition to carrier actions; labor and management would be locked in battle, either in the streets or in the courts, over minor disputes, rather than attempting to adjust them amicably and submitting them to arbitration by "a tribunal consisting of workers and management to secure * * * prompt, orderly, and final settlement * * *," as Congress intended. *Union Pacific* v. *Sheehan*, *supra*, 439 U.S. at 94. And justifiable expectations under labor contracts could be set at naught, for carriers could be enjoined from acting, or subjected to strikes, or unions enjoined from striking, on the basis of contract interpretations by the courts, which this Court has recognized are singularly unsuited for such a task.[18]

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[18] "[T]he industrial common law—the practices of the industry and the shop—is * * * a part of the collective bargaining agreement although not expressed in it. The labor arbitrator

Nothing in the Act warrants such a chaotic result. Nothing in this Court's decisions supports it, and indeed they are squarely to the contrary. The Court has held that arbitration of minor disputes is not optional, as RLEA contends, but is "compulsory." *Chicago R. & I., supra*, 353 U.S. at 34, 39; see *Elgin, supra*, 325 at 727-28. It has held in an unbroken line of cases that the Board's jurisdiction in that regard is exclusive. Every court of appeals that has been presented with the question has heeded that admonition, and has accepted the same standard applied by the court of appeals in this case for protecting the exclusivity of the Act's arbitration remedies by ensuring that minor disputes are not brought to court under the guise of status quo claims. Nothing in RLEA's petition suggests any basis for reviewing that well-settled law, much less for overruling the decisions of all those courts, and still less for overruling the numerous decisions of this Court, from *Elgin* down to *Sheehan*, that would have to be overruled in whole or in part to reach that result.

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is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract. * * * The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed." *Warrior & Gulf, supra*, 363 U.S. at 581-582.

That observation, made in a National Labor Relations Act case, applies with even greater force under the Railway Labor Act. "From the point of view of industrial relations our railroads are largely a thing apart. * * * 'The railroad world is like a state within a state. Its population * * * has its own customs and its own vocabulary, and lives according to rules of its own making * * *.'" *Elgin, supra*, 325 U.S. at 751 (citations omitted); accord *Railroad Trainmen* v. *Terminal Co.*, 394 U.S. 369, 392 (1969). Adjustment boards are "peculiarly familiar with the thorny problems and the whole range of grievances that constantly exist in the railroad world." *Gunther, supra*, 382 U.S. at 261.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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